



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NUMBER 92 OF 2007**

**JANE WANJIRU NJOROGE.....APPELLANT**

**VERSUS**

**BARNABAS LONGIT MUNGO.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment by W.M. Kagendo Senior Resident Magistrate, sitting at Nakuru Court on 14<sup>th</sup> May, 2007 in the Chief Magistrate Court Case No. 427 of 2002)*

**JUDGMENT**

1. The appellant filed her Record of Appeal on the 7<sup>th</sup> July 2011 within the requisite period as provided under **Section 79G of the Civil Procedure Act**. On the 19<sup>th</sup> August 2011, a Supplementary Record of Appeal was filed. A Further Supplementary Record of Appeal was also filed on the 26<sup>th</sup> August 2011.

The appeal is against the judgment of the trial courts Judgment delivered on the 14<sup>th</sup> May 2007 in which the appellants claim for a sum of Kshs. 376,000/= was dismissed with costs.

2. The grounds upon which the appeal was lodged are that the trial Magistrate erred in law and fact in finding that the appellant did not supply beans to the Respondent while evidence on record was sufficient to establish that the appellant proved her case and that the respondents did not discharge their duty nor proved that the beans were not supplied or paid for.

3. This court being the first appellate court is under a duty and obligation to reconsider and reevaluate the evidence adduced before the trial court and come up with its independent findings and conclusions. See **Selle -vs- Associated Motor Boat Co. Ltd & Others - (1968) EA 123**. The court is however not bound to agree with the findings and conclusions on facts. It is to evaluate and interrogate the evidence to find out whether the conclusions by the trial court were based on the evidence adduced and if such conclusions were based on no evidence or whether the court left out an relevant factor or considered an irrelevant one.

4. **The Appellant's Evidence** is based on the plaint dated the 11<sup>th</sup> March 2002. It was the appellant's claim that she had supplied to the 1<sup>st</sup> Respondent bags of beans to the G.K. Prison at Nakuru on order of the 1<sup>st</sup> respondent being an agent of the Government, that the order was made by the 1<sup>st</sup> Respondent in his personal capacity or as an agent of the Government.

In her Evidence, **PW1 the appellant Jane Wanjiku testified** that the 1<sup>st</sup> respondent who was in charge

of the Nakuru G.K. prison introduced her to the prison and it was agreed that she would supply 120 bags of beans at Kshs.3,600/= per bag, and that the beans would be kept at Kitale Prison which she did.

She produced PExt 1 - delivery note dated 18<sup>th</sup> March 1999. It is received and stamped. It shows 120 bags received at Kitale Remand Prison. It was her evidence that she was paid Kshs.56,000/= on the 24<sup>th</sup> September 1999, but the balance was never paid hence the suit.

5. **PW2 Peter Njoroge** testified that he knew the 1<sup>st</sup> Respondent as a prison's officer and that he had supplied beans to the prison and paid Kshs.50,000/= and the balance was not paid.

6. **The 1<sup>st</sup> respondent testified as DW1.** His evidence was that he procured the appellant a buyer for her beans and an agreement dated 15<sup>th</sup> March 2006 (PEX1) was executed between himself and the supplier **Peter Opando** for the supply of the beans to the Nakuru G.K. Prison. The price is shown as Kshs.3,600 per bag. The agreement also states that the beans would be supplied through Kitale prison. The supplier confirmed that the beans were his and that nobody else was concerned with the same.

The 1<sup>st</sup> Respondent signed as the Receiver, being the Officer incharge Nakuru prison G.K.

7. It was his further evidence that Kitale G.K. Prison acknowledged receipt of the beans but the contractor, (PW2 – Peter Opando) would go to collect them, and that Nakuru G.K. prison would issue the L.P.O for the 120 bags and payment was made in 1999 September, and that a sum of Kshs.58,000/= was paid to the appellant through someone called Nicholas who acknowledged the payment from Mugo. The payment note was produced as DExt 2.

It was his evidence that all along he did not know the appellant, but knew Peter whom he recognised as the supplier and therefore had nothing to do with the appellant. He stated his role as an agent of the government to get food for the prison. He however confirmed that 120 bags of beans were supplied to the prison at Kitale and that the delivery note shows Jane Wanjiku Njoroge and not Peter Opando as the supplier. He further stated that the prison is not allowed to source directly without a Local Purchase Order(L.P.O) He stated that the purchase price Kshs.432,000/= but the beans were supplied through a contractor Francis Kimei. He denied having been an agent of the contractor and signed as officer in charge of the prison, and that it was Kimei who was to be paid. He also confirmed that there is no relationship between the Government and the appellant as far as the case is concerned and therefore has no claim against the Government.

8. **DW3 Francis Kimei also testified.** His testimony was that he was a contractor to supply foodstuff to the G.K Prison Nakuru but denied knowing the appellant. He acknowledged delivery of 120 bags of beans to the prison and acknowledged having been paid, and thereafter paid Mugo(1<sup>st</sup> defendant) who was to pay the owner of the beans.

9. It is evident that there were some business relationship between the appellant, the 1<sup>st</sup> respondent and other persons, Francis Kimei and Peter Opando, that is not documented. There is no doubt that the 120 bags of beans were supplied and paid for.

DW3 Francis Kimei confirmed having been paid the full price and in turn paid the 1<sup>st</sup> respondent who in turn would have paid the owner of the beans. The Agreement signed on 15<sup>th</sup> March 1999 the Supplier Peter Opando stated:

***“---I confirm that the beans are mine thus the agreement and no body else is concerned with the same.”***

The above is a clear indication that the appellant was not a party to the agreement. It was upon the above evidence that the trial Magistrate made findings on the issues for determination as to who was paid for the supply of the beans. The findings that the terms of contract were not clear nor the purchase price

mentioned in the agreement (PExt 1), and that the appellant was not a party to the agreement. He discounted the said agreement as a contract and found that no privity of contract existed between the appellant and the 1<sup>st</sup> respondent.

10. I have considered the evidence and documents produced. I cannot find any privity of contract between the appellant and the 1<sup>st</sup> defendant. The alleged contract for supply of goods to the G.K. Prison was neither supported by any legal document or agreement, and the only document the appellant relied on excluded her from claiming any money. She could only do so from the person named Peter Opando whom she did not enjoin as a party to her suit. It is trite that any supply of goods and services to a Government institution must be done through the Government laid down procurement procedures. A party must be pre qualified as a service provider before they may supply any goods or services to a Government institution.

11. In the case **Pakatewa Investments Co. Ltd -vs- Municipal Council of Malindi(2016) e KLR** the court faced with similar issues held that proper tendering procedure must be followed which was not the case in the present appeal.

I have stated that a supplier must be prequalified for the supply of various goods for a specific period. The prices by the prequalified suppliers must be known and quantities ought to be indicated in any local purchase orders. If parties enter into dubious business relationships with individuals who pretend to represent the government then they only have themselves to blame if payments are not made.

12. The present matter is such that the appellant was misled, cheated and duped into believing that she would be paid upon supply of the beans to the prison, a government institution without any tender papers or a contract executed by the duly authorised officers and herself.

13. I therefore find that the trial Magistrate upon the evidence tendered cannot be faulted in his conclusion that the appellant did not prove her case to the required standards.

The appellant has not demonstrated that the trial Magistrate left out of consideration any relevant factor, or considered an irrelevant one thus arrived at a wrong conclusion for the court to interfere with the Judgment. I find no merit in the appeal. It is dismissed with costs.

**Dated, Signed and Delivered this 20<sup>th</sup> Day of July 2017.**

**J.N. MULWA**

**JUDGE**